IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1899.

Nos. 38 AND 39.

UNITED STATES,
Appellant,
vs.
J. FRANCISCO CHAVEZ.

From Court of Private Land Claims.

STATEMENT OF FACTS.

These two cases were tried together in the court of private land claims, the trial resulting in one decree of confirmation covering both claims, so that a single record might have sufficed to bring up both cases. The two records on file in this court are identical so far as the proceedings on the trial, the evidence, the decree and the opinion of the court are concerned. It will be apparent upon a review of the facts that the cases could not well have been tried otherwise than as one case.

The claimant Chavez, his father and grandfather, and their predecessors in title, are shown by the evidence to have had possession of the land which he

claims, continuously ever since some time prior to the year 1785. So long continued had been this possession that claimant actually did not know what was the original title from the government of Spain under which the land had been held; but he believed until shortly before the time when the cases were filed in the court of private land claims, that his title originated under another and different grant, which adjoins the more southerly one of the two set up in these cases. It is seriously urged by the government that this lack of knowledge and mistake on the part of claimant, furnish a reason for rejecting these claims.

In the brief of counsel for appellant, reference is made to another case which had been tried not long before these cases were filed, and there is a suggestion of a desire to go somewhat outside of the record in order to indicate the inconsistent claims of this appellee, as he had sought first to obtain a confirmation of the other grant including within it the land now asked for, and failing in that attempt thereafter presented these cases as the foundation of his title. There is no disposition on the part of appellee to prevent the court from getting all the facts before it, and, indeed, under the statute this court could, if it saw fit, order the taking of additional evidence. There will be no disagreement, however, between opposing counsel in this case as to matters of fact, and it is proposed therefore to begin this statement with some account of the case first presented as naturally leading up to the case now under examination.

In July, 1716, Ana de Sandoval y Manzanares presented her petition to the governor and captain general of New Mexico, setting forth her destitute circumstances, being a widow and burdened with children, and asked for a tract of land called San Clemente, which she had had by inheritance from her

father. This land was described as extending from the Rio del Norte on the east to the Rio Puerco on west, and as bounded on the north by lands of Cristobal de Tapia. The governor granted her the land for which she asked, referring to the fact that the land had belonged to her father who had been compelled to abandon it on account of the insurrection of the year eighty. In this statement he referred to the Pueblo Indian revolution of the year 1680, at which time the Spaniards were entirely driven out of the country and did not return until about 1692. Practically all of the land titles of that earlier time were terminated by the insurrection, but in a number of cases, as in this one, when grants were asked in the early part of the eighteenth century, references were made to the lands having formerly belonged to ancestors of the petitioners or to other persons.

The governor also directed Captain Antonio Gutierrez to place the petitioner in possession of the land, which that officer proceeded to do on the 23rd day of July, 1716, giving the same boundaries as those set up in the petition, with the exception of the boundary on the north which he declared to be a ruin a little above the Pueblo of San Clemente.

The papers showing this grant will be found at pages 30 to 33 of the printed records.

In the year 1747 the archives show that one Domingo de Luna was living on this grant made to Ana de Sandoval, having purchased portions of the land from heirs of the original grantee, and Lunas have lived on the same land continuously from that time down to the present, there being a town called Los Lunas on the grant, which is the county seat of Valencia county.

In the year 1871 the claimants of interests in this property presented the grant to the surveyor gen-

eral of New Mexico, by whom it was favorably reported to congress; and subsequently, in the year 1877, a survey of the claim was made under the direction of the surveyor general of New Mexico which made the northern boundary of the grant practically coincident with the southern boundary of the previously patented grant to the Indian Pueblo of Isleta, and extending across the present Rio Grande del Norte in its northern portion to an old river bed as the eastern boundary. In 1716 the river ran some distance to the east of its present course as is shown roughly on the sketch maps which appear in each of the records in these cases. It appears to have become the general belief that the grant to Ana de Sandoval covered all of the land between the Nicolas Duran de Chavez grant on the south, and the Isleta grant on the north. The land claimed by this appellee lies between the old and the new river beds and was believed by him to belong to the same grant as that under which the Lunas held their lands. So believing, he instituted in his name proceedings in the court of private land claims to obtain the confirmation of that grant. When the case came on for trial the government presented from the archives of the Spanish and Mexican governments in the office of the surveyor general for New Mexico, archives numbered 315 and 178, which showed the fact that there were two grants between the Ana de Sandoval grant and the Isleta grant, and that possibly all of the land claimed by Colonel Chavez fell within those grants. The court thereupon permitted an amendment so as to make Mr. Solmon Luna co-claimant with Colonel Chavez, and Mr. Luna clearly traced title to portions of the grant back to heirs of the original grantee from whom purchases had been made by his direct ancestor prior to the year 1750. Confirmation of the grant was had, but the land which the government had shown to be embraced within the two grants

above referred to was excluded from that confirmation, and all of the land of Colonel Chavez was so excluded. Thereupon he promptly filed the two cases now under examination, in the court of private land claims, relying substantially upon the same evidence which he had presented in support of his claim in the first case to show his title to the land which he claimed. He indicates in his testimony at page 10 of the printed record that he knew nothing about these two grants, except from the papers and the argument which had been made at the preceding term of court. It will be seen that these titles were relied on by the government in the earlier case to defeat the claim which was made to a very considerable tract of land as to which possession had been held, as hereinbefore stated, from some date prior to 1785.

The evidence in the first case showed with regard to these two grants, much the same condition as is shown by the evidence in these two cases, and will now be briefly set forth:

On the 5th of November, 1716, Captain Antonio Gutierrez, the same person who had delivered possession of the Ana de Sandoval grant in July of that year, petitioned the governor and captain general for the grant of a tract of land below Isleta, which formerly had been held by Cristobal de Tapia, setting forth the boundaries as being on the north an arroyo of cotton wood trees which came down from the hills, on the south the Pueblo of San Clemente, on the east the Rio del Norte, and on the west the hills of the Rio Puerco. Cristobal de Tapia was undoubtedly owner of the land before the insurrection of 1680, and like almost all of such owners, all record of his title had been destroyed, although the memory of his possession still remained. The governor in the name of the king made to the petitioner the grant for which he asked, as he described it, and directed Cap-

tain Baltazar Romero to put the petitioner in possession. No act of juridical possession appears in the archives, but other documentary evidence from the archives shows that Gutierrez undoubtedly received possession of the land and transferred it to Diego Padilla, who in the year 1734 conveyed it to Diego Borrego, as will appear by the conveyance which will be found on page 16 of the printed record, as a part of archive No. 178.

In this archive first appears evidence of the existence of the grant to Joaquin Sedillo, which is the beginning of the title set up in the case numbered 208. In the conveyance of Padilla to Borrego the land is described as bounded on the north by lands of Joaquin Sedillo. It is clear from the wording of this conveyance that Padilla held the whole of the land of Gutierrez and conveyed it all to Borrego, and he declares that he has the title papers of the whole tract. The contention of appellants that he did not convey it all to Borrego is not well founded, and even if correct, would be immaterial.

A part of the same archive is another conveyance to the same Borrego by Antonio Sedillo, legitimate son and heir of Joaquin Sedillo, transferring a tract of land which he declares to have been acquired by his father in part by grant from the king and in part under royal sale, as shown by five instruments which he delivered. This does not mean, as suggested by counsel for the government, that there were five purchases of five tracts of land. It might with equal propriety be argued that the five instruments were five different grants from the king. The reasonable construction is that some of the instruments delivered showed a grant or grants, and some of them showed a purchase. The land thus conveyed was bounded on the north by the lands of the Isleta Pueblo, on the east by the Rio del Norte, on the south

by a twin alamo called by some people the *alamo de la culebra*, and on the west by the *ceja* of the Rio Puerco.

The indications are, so far as any conclusion can be clearly drawn from these conveyances, that Diego Borrego in 1734 acquired the title to all of the land included between the lands of Isleta and the lands of Ana de Sandoval y Manzanares, and in 1736 conveyed it to Nicolas de Chaves.

So far as the archives disclose there is a gap in the chain of title between 1734 and 1785 when official proceedings were had as to the inventory and partition of the property of Don Clemente Gutierrez. In that inventory was included, as will appear by reference to page 20 of the record, a ranch below the boundary of the Pueblo of Isleta commonly called San Clemente, Barrancos and Los Pinos, of which there had been possession, although there was no deed showing its boundaries. It is not known whether the river had changed its course prior to this time or not, but probably it had. The portion of the land in question known as Los Pinos in this inventory, lies between the old and new river beds and is the portion claimed by this appellee. This portion had acquired the name of Los Pinos or the Bosque de los Pinos, at some time between 1734, when it was conveyed to Diego Borrego, and 1785 when the inventory of the property of Clemente Gutierrez was made. This seems to indicate that a family named Pino had, at some time during this interval, owned or occupied the place.

The proceedings as to the estate of Gutierrez show a division of the land in question, one-half to his widow, Apolonia Baca, and one-tenth to each of five children. Beginning in the year 1818, Francisco Xavier Chavez, the grandfather of J. Francisco Chavez, began the purchase of the lands of the Bosque de los Pinos from the heirs of Gutierrez, as will ap-

pear by reference to plaintiff's exhibits D, E, and F, which clearly show the acquisition of four-fifths of the title of the Gutierrez family to these lands. Counsel for the government urge that the deeds show the acquisition of only four-tenths, but they forget that the children of Clemente Gutierrez were equally the children of his widow, Apolonia Baca, and had inherited their mother's share of the property before the first deed in 1818, which indicates that she was dead before that time. There is no evidence as to what has become of the interest of the fifth child of Clemente Gutierrez, but there can be no doubt of the continuous, notorious and undisturbed possession of the Chaves family under the title obtained from the heirs of Gutierrez.

In the case first tried of the Ana de Sandoval grant there was also put in evidence certain documents which do not appear in the present case, relative to disputes between Francisco Xavier Chavez, in 1824, and his neighbors on the south, at the place called Peralta, who had bought land from the Indians of Isleta; and also a like dispute between Mariano Chaves, the father of J. Francisco Chavez, and the same people in the years 1835 and 1836. The result of both these suits was in favor of the Chavez people and the establishment of their boundary line at or near the south side of the old river bed. In the proceedings of 1836 the titles of the respective parties are quite fully set out by the alcalde in his record, and it appears that the Indians of Isleta had, about the middle of the last century, purchased the lands of certain Padillas which extended from the river on the west, to the mountains on the east, and in the year 1795 or 1797, sold the southern portion of that land to the people who built up the settlement or town of Peralta. These Padillas were the heirs of Diego Padilla, who had a grant of land lying east and south of the Bos-

que, on the opposite side of the river. It is to be noted that as early as 1836 the course of the river had been changed for so long a time that the fact had become obscured in the memories of men, inasmuch as the alcalde criticises the Isleta Indians for appearing to convey more land than they really owned because they gave the western boundary as the river when, of course, that boundary should have been construed to mean only the old river bed. Reference is made in these proceeding to the acquisition by the Chavez family of the title to the lands from the heirs of Gutierrez, and it is clearly shown that the Chavez title to the Bosque de los Pinos was then complete. Copies of these papers are printed herewith.

In some of the deeds to Francisco Xavier Chavez, the southern boundary of the land conveyed is given as the lands of Los Lentes. By reference to the sketch map in the printed records it will be seen that there is a settlement called Los Lentes on the west side of the river. Los Lentes was an off-shoot from the Pueblo of Isleta, and was originally settled by Indians who had purchased lands from other people, and the Chavez deeds indicate that what were known as the Lentes had lands on both sides of the river. Lente or Ente appears to have been an Indian family name.

The result of the prosecution of the claim for the Ana de Sandoval grant was a confirmation which fixed the northern boundary at a point about three-quarters of a mile north of the chapel of Los Lentes, thus excluding the lands between that point and the Isleta grant, the court being convinced by the evidence presented on behalf of the government that that land belonged to the successors in interest of the titles of Antonio Gutierrez and Joaquin Sedillo which had in 1734 become united in Diego Borrego, and was a part of the estate of Clemente Gutierrez at his

death in 1785, and subsequently passed to the possession of the Indians of Isleta on the west side of the river, and to the Chavez family on the east side.

Having thus been instructed by the government as to the true source of his title, J. Francisco Chavez instituted in the court of private land claims these proceedings to secure to himself the land which appeared to have been held in private ownership from some period prior to 1734.

Upon the trial of these cases in the court of private land claims, as will be seen by inspection of the record, no evidence was offered on behalf of the government, and there can be no dispute as to the facts. It is probable that the evidence on behalf of the claimant was not as full and complete as it might have been had there been any substantial contest upon the trial. The findings of fact by the court are substantially the same as what is herein set out as will appear by reference to pages 35 and 36 of the printed record.

POINTS AND AUTHORITIES.

I.

The proofs are suffic ent to sustain the confirmation.

Before attempting to answer a portion of the arguments of counsel for appellant as to the testimony, we will endeavor to state briefly what was proved in the court below. It is to be kept in mind that the government offered no testimony whatever, and there can be no dispute as to the facts.

The two cases should be treated here as they were in the court below, as one claim for a single tract of land. The proofs clearly show:

1.—A grant to Antonio Gutierrez, in 1716, of the southern portion of the tract, adjoining the grant to Ana de Sandoval. *(Record, p. 11.)*

2.—The ownership of the northern portion between the Antonio Gutierrez grant and the Is-

leta grant, at some time prior to 1734, by Joaquin Sedillo, who held a part by grant and a part by purchase. *(Record, pp. 18 and 16.)*

3.—The conveyance of the southern portion by Diego Padilla to Diego Borrego, January 7, 1734. *(Record, p. 16;)* of the northern portion by the heirs of Sedillo to said Borrego, January 11, 1734. *(Record, p. 18;)* and of the whole tract by Borrego to Nicolas de Chavez, August 16, 1736; *(Record, p. 13.)*

It should be here stated that these conveyances are not in evidence for the purpose of showing title in the appellant, but to show that in 1734 and 1736 the land was private property and the subject of sale and transfer under official supervision and sanction.

4.—The ownership of the whole tract by Clemente Gutierrez prior to his death in 1785. This is shown by the inventory and distribution of his estate, made by Governor Juan Bautista de Anza. *(Record, p. 19 et seq.)*

5.—The sale of at least four-fifths of the portion of the land between the old and new river beds by heirs of Gutierrez to Francisco Xavier Chavez, grandfather of appellee, beginning in 1818, and unbroken possession ever since by the Chavez family. *(Record, pp. 7-8 and 23 to 26.)*

6.—The open and notorious possession and use by the Pueblo of Isleta, of lands on the west side of the present river from the boundary of the pueblo lands to the north boundary of the Ana de Sandoval grant, as far back as the memory of the oldest man in the pueblo can extend, such possession having been claimed to be under purchase from the heirs of Clemente Gutierrez. *(Record in No. 207, p. 10.)*

7.—That the possession of Clemente Gutierrez and those claiming under him has been continuous and unbroken from some date earlier than 1785 down to the present time.

From these undisputed facts, the court is justified in holding:

1.—That before 1734 all of the land had been segregated from the royal lands of Spain and that

the title had vested in Antonio Gutierrez and Joaquin Sedillo;

2.—That the private ownership and possession shown to exist in 1734 and 1736, in accordance with a familiar rule, in the absence of proof to the contrary, continued;

3.—That the ownership and possession by Clemente Gutierrez were lawfully acquired, although direct documentary evidence cannot now be had;

4.—That the title to the land, under the Spanish law of prescription, was complete and perfect in February, 1848.

It seems necessary briefly to make answer to some of the arguments of special counsel for appellant, as to the sufficiency of the proofs in these cases.

No attempt will be made to follow that argument in all its details as set forth in the printed brief on file, but merely to touch upon some of the more salient points.

It must be said, first, in a general way, that many of the difficulties and objections raised by appellant's counsel, grow out of a misconception of the meaning of one clause in the act creating the court of private land claims. The clause is to be found at the beginning of the first sub-section of section 13 of the act, which declares that "No claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the government of Spain or Mexico." This clause clearly declares a fact to be proved, but it lays down no rule as to how proof of the fact shall be made. Counsel for the government evidently consider that this clause declares a rule of evidence, and that its effect is to deprive claimants of the benefit of anything except direct, positive, proof and unmistakable record evidence of the grants under which they claim. No presumptions of the kind which are ordinarily considered integral and inseparable por-

tions of the law of evidence, can be indulged on behalf of the claims to be tried by the newly-created court. A statement of this position sufficiently indicates its absurdity, and counsel for the government will declare that they have not taken, and do not intend to take, any such position. It is respectfully submitted, however, that the printed argument as to the insufficiency of the testimony in these cases, is unconsciously based on this erroneous position, and that it will appear upon careful examination that counsel confuse the thing to be proved with the mode and character of proof, make the end to be attained stand for the means to reach that end, and the destination appear to be the road to that destination.

Great stress is laid by counsel for the government upon the failure to produce from the archives of the Spanish government the act of possession to Antonio Gutierrez and the grant to ~~Antonio~~ Joaquin Sedillo, and it is stated that no attempt was made to account for their absence. During the earlier part of the existence of the court of private land claims direct proof was made in a number of cases of the repeated spoliation and destruction of papers belonging to the Spanish and Mexican archives both under the Mexican and American governments. While direct proof was made of these facts, yet they were so connected with the history of the country that the court might well have taken judicial notice thereof without any evidence; but the facts were so fully shown that practically the court has taken notice of them in probably half of the cases which have been tried. We ask this court now to follow the same course, and not to punish the present claimant on account of the incomplete and imperfect condition of the Spanish records. Every one familiar with conditions in New Mexico knows that those records are incomplete and imperfect, and that many grants have not even been presented to

the court of private land claims on account of the loss of documentary evidence by which to prove them.

U. S. vs. Chavez, 159 U. S., 462.

The absence of thess papers from the records is, however, fully supplied by the evidence from the same records which shows that in 1734 the land was in possession of the successors in interest of both Gutierrez and Sedillo and was at that time the subject of purchase and sale. This is strengthened also by the evidence of the action of the governor of New Mexico in 1785 in making the inventory and distribution of the estate of Clemente Gutierrez involving the whole of the land claimed in these cases. Attention is particularly called to this for the reason that it is urged by counsel for the government that these claims are imperfect because no proof is adduced of their having been confirmed by the governor of New Mexico in accordance with the requirement of the royal cedula of October 15, 1754. The action of the governor in 1785 gives strong ground for the belief that the title was confirmed at that time if it never had been before. What is said in the brief for the government at page 46 about intendants, can have no bearing in this case, as New Mexico was never brought under the jurisdiction of any intendant, but, on the contrary, was specially excepted from the intendencies and its control by the governor distinctly preserved.

Ordenanzas de Intendentes. Art. X.

Counsel for the government, ignoring the well-recognized facts as to the defective condition of the Spanish archives, and urging that the absence of the juridical possession of Antonio Gutierres is fatal to the claim, print as an appendix to their brief, a portion of archive No. 769 from the office of the Surveyor General of New Mexico, in which Governor Cachu-

pin in 1750 refused the revalidation of a grant because the possession was not made to appear. This is quite extraordinary, in view of the fact that in 1788 the heirs of the original grantee, Alfonzo Rael de Aguilar, renewed their application for the land which had been granted to their ancestor, and Governor Fernando de la Concha granted what they asked and put the heirs in possession of the land, which was 2,500 varas in width, dividing the tract into three portions of 833 varas each, from which it would appear that there were three equal heirs of the original grantee. This grant has been presented to the court of private land claims and has been confirmed. A portion of the papers will be found in *Mis. Doc. No. 181, House of Representatives, 42nd Congress, 2nd Session*, at page 101 *et seq.*

If the action of Governor Cachupin in 1750, as is urged at page 17 of the brief for the government, "is most instructive as a contemporaneous construction by the chief official of the province of the necessity for juridical possession," the later proceeding by Governor Concha, disregarding and reversing the action of his predecessor, is even more instructive as throwing light upon conditions as they existed in New Mexico in the last century—conditions so obscured by lapse of time and loss of records as to make it exceedingly difficult for us at the present day to get at the real facts and fully to understand the nature and value of titles as they then existed. This difficulty has been, in more than one case, forced upon the attention of this court.

Ely's Administrator vs. U. S., 171 U. S., 223.

U. S. vs. Peralta, 19 How., 347–8.

It is also urged against these grants that it is not clearly shown what were their nature and character, and whether they might not have been made upon

conditions subsequent, proof of the performance of which is a prerequisite to a confirmation. So far as we know, conditions such as are referred to, were limited to a period of but a few years after the making of a grant and were usually as to cultivation, non-alienation, etc. Direct proof of the performance of such conditions in the early parr of the 18th century is now impossible; but proof of private ownership and possession continued down to the present time raises a conclusive presumption that all necessary conditions were actually complied with.

It is also suggested that the Joaquin Sedillo grant may have been made "by an alcalde or by some other of the subordinate officials, who so frequently and without authority assumed the power to alienate the public domain in New Mexico under the Spanish government." Appellee is compelled to challenge the correctness of this assertion. So far as our researches extend, no instance of such unwarranted exercise of authority by subordinate officials can be found, until many years after the expiration of the last century. While it is usually dangerous to be positive as to what did, or did not, take place under the former governments, yet it seems safe to assert that the Spanish archives will not show a single case of an original grant attempted by any one except governors at any time before the Mexican independence.

It is seriously urged against this claimant that down to a short time before he filed these cases in the court of private land claims he was mistaken as to the true origin of his title to the land which he knew had been in the possession of his family from the year 1818, and prior to that time had certainly been in the possession of Gutierrez and his heirs for many years back into the last century. In a number of the original colonies along our Atlantic seaboard may

be found conditions not dissimilar to those prevailing in those portions of New Mexico which were settled shortly after the reconquest of the country in 1692. If that portion of our country were ceded by our government to some other sovereignty, with careful treaty stipulations as to the preservation of property rights, and the unfortunate inhabitants were called upon by the new sovereign to make proof of their titles to lands and required to show that they held under titles "lawfully and regularly derived" from the government of England or the United States, how many of the present owners of lands in Virginia, New Hampshire or Vermont cou'd make such proof as is now insisted upon by the representatives of the United States? What would be the condition of a large portion of the inhabitants of the 138 towns in Vermont which had been chartered by New Hampshire prior to the determination of the controversy between New Hampshire and New York in favor of the latter? Take as a special instance of the confusion and uncertainty which would arise, the case of land titles in those portions of New Hampshire bordering upon the Piscataqua and Exeter Rivers. In November, 1620, James I chartered the Plymouth Company for the governing of New England, which was the territory between the 34th and 48th parallels of north latitude. In 1622 this company gave a special charter to Gorges and Mason of the land between the Merrimac and Kennebec Rivers, extending sixty miles inland. It is stated by some authorities that the settlements at Portsmouth and Dover were made in 1623, under this charter by companies sent out by Gorges and Mason. It is also stated, as a recently discovered fact, that David Thompson had a grant of land and founded these aettlements, and that Mason had nothing to do with them. There was litigation for more than

a century and a half by Mason and his successors in title in their efforts to establish their proprietary right. Reverend Doctor Quint, of Dover, declares that all of the land titles in Dover and several neighboring towns proceed from a grant to Edward Hilton and associates in 1630. He also says, however, that great conflicts were usual in the early grants. References are made to these conditions in the following authorities:

23 Encycl. Britann., 77.

17 Encycl. Britann., 403.

4 Encycl. Americana, 23.

History of Rockingham and Strafford Counties, 758 et seq.

Without going into any comparison of the merits of these different charters and grants, which would be entirely unimportant, what would be said of the attempt to confiscate the land on Dover Point because its present holders earnestly claimed title from John Mason when it really came from Edward Hilton? Or because they set up a claim under Hilton when the true source of their title was the grant to David Thompson? And yet that is substantially what is here asked by the representatives of the government as to the lands now under consideration.

Counsel for the government innocently suggest that the owners of the property in 1736 may have lost their title to their property, because the country was overrun by Indians and they were compelled to abandon it. Unfortunately for this suggestion there is nothing in the history of New Mexico to support it. It may be asserted with confidence that at no time after 1736 did the Indians or anything else cause the abandonment of any lands or settlements

anywhere in the valley of the Rio Grande between Bernalillo on the north and Socorro on the south. This was the richest, most easily cultivated and most thickly settled portion of New Mexico, and there is no instance on record of any men or set of men having abandoned a foot of land in that valley after the early years of the 18th century.

The further suggestion that Congress has fully provided for a case like the present one by permitting people to retain their homes and ancestral possessions upon proving possession for no less than twenty years, has no application, because that provision is limited to the amount of 160 acres, while the Bosque de los Pinos, for which Colonel Chavez is contending, contains probably 2,000 acres.

While it it is perhaps immaterial and unimportant, yet the contention of the government that the two tracts of land were not all united in the possession of Diego Borrego in 1734, may not be unworthy of attention. This contention is founded upon the fact that in the conveyance of Diego Padilla to Borrego, the boundary on the south is said to be land of Diego Padilla, and counsel for the government jump at the conclusion that this land was a part of that which Padilla had received from Antonio Gutierrez. This is pure assumption. A careful examination of the conveyance, in both languages, beginning as it appears on page 15 of the record in number 207—it is incorrectly printed in number 208—will show that it purports to convey to Borrego the piece of land which Padilla had received from Captain Antonio Gutierrez, the southern boundary being a line midway between two houses which Padilla had built near the boundary line of

the land received from Gutierrez. It is to be noted that this Diego Padilla was a grant owner in the same vicinity, having land east and south of the Bosque de los Pinos, but on the other side of the old river, and he may well have owned other land on the west side of the river.

II.

The title to the land was complete and perfect in 1848.

All that is required by section 8 of the act of congress is that the title should be "complete and perfect at the date when the United States acquired sovereignty." Counsel for the government devote a great deal of space to arguing that the evidence adduced does not show that the grants as originally made were "complete and perfect" and that there is no direct evidence of such subsequent approval by the king or by the governor as to make them "complete and perfect." The true question to be discussed is not as to what the title was at its inception, or at any time during the 18th century, but what was its condition in February, 1848? An examination of the opinion of the court below will show that the confirmation was put largely upon the fact that forty years' possession, proceeding upon a title by inheritance, was sufficient evidence of a perfect title to the whole tract, and sufficient to show a connection of such possession with the original grant. In this opinion the court adhered to the views previously expressed in the case of the Alameda grant. In that case the opinion of the court, written by Associate Justice Sluss, so fully and ably sets forth the law on this point, that I cannot do better than to print it as a supplement to this brief, and to ask that the court read it in connection with this point.

It will be seen, even if we disregard, in this connection, the evidence as to the ownership and pos-

session in 1734 and 1736, and the presumption that such ownership and possession continued, there being no evidence to the contrary, yet there has undoubtedly been continuous possession by inheritance and subsequent purchase, which were considered "just title," in the language of the Spanish law, for more than sixty years before the United States acquired sovereignty over New Mexico, whether we fix the date of such acquisition in 1846, when General Kearney entered Santa Fe, or in 1848 when the treaty was made.

While the facts in the Alameda case are not exactly parallel to those in the present case, yet there is a close similarity, and the reasoning of the court in that case is strongly and directly applicable to the claim of appellee.

This court has already in substance recognized the propriety and conclusiveness of the position of the court of private land claims.

U. S. vs. Rocha, 9 Wall., 646.

U. S. vs. Pillerin, 13 How., 10.

U. S. vs. De Haro, 22 How., 297-8.

Whitney vs. U. S., 167 U. S., 546.

U. S. vs. Chavez, 159 U. S., 463-4.

In the case last cited, at page 464, the court clearly and distinctly declares the propriety of presuming a grant or title by record under such conditions as those which are shown to exist in this case, and says that the principle upon which this doctrine rests is one of general jurisprudence and was a feature of the Mexican law at the time of the cession.

III.

The form of the decree was proper, but is immaterial.

The last point sought to be made on the part of the government is that the confirmation should not have been to this appellee nor to the Pueblo of Isleta, although possession of the property is clearly shown for more than a hundred years. The argument is based in part upon the assumption that there is still outstanding a portion of the title of Clemente Gutierrez and that this confirmation would prejudice some possible heirs who may have some right. It is respectfully submitted that under the provisions of the act creating the court of private land claims, which are quoted at pages 52 and 53 of appellant's brief, the confirmation can have no injurious effect upon the rights of any imaginable tenants in common under inheritance from Clemente Gutierrez, and would not in any of the ordinary courts be permitted to have such effect. It can be of no consequence whatever whether the confirmation is made to this appellant and the Pueblo of Isleta, or to the heirs and legal representatives of Antonio Gutierrez, or of Joaquin Sedillo, or of Diego Borrego, or of Nicolas de Chavez or of Clemente Gutierrez. The decree can be conclusive only as between the United States and persons claiming any interest in the land.

It is suggested that there is no proof that the Pueblo of Isleta is the owner of the land as far as the Ceja of the Rio Puerco which is some miles west of the Rio Grande. The proof is clear that the Pueblo has had possession of the lands on the west side of the river between the boundary of the pueblo and the lands of Los Lentes, and this clearly includes, if not more, at least all the lands in the valley on the west side of the river, and as to the lands further to the west they are practically of no value whatever,

except to a very slight extent for purposes of pasturage. However, this appellee has no concern as to the lands of the pueblo and is not charged with any duty towards them; but it is proper to suggest that, however it may appear upon the face of the record, the admission made by the government as to the possession of the pueblo, was at the time intended, and was understood by the court to mean, that all of the land in these grants on the west side of the river was possessed and claimed by the Indians.

In conclusion it may truthfully be said that the confirmation of these claims does not call for any such "too free use of presumptions" as is deprecated by council for the government at the close of their brief. One presumption only is asked, and is essential to the case, and that is the presumption set out as proper by this court in the closing sentences in the case of *U. S. vs. Chaves, 159 U. S.* And the facts and circumstances as to the long-continued ownership and possession of the land claimed, are such that every consideration of national good faith, justice and equity call for the confirmation, and for the indulgence of every possible proper presumption necessary to reach that end.

F. W. CLANCY,
Counsel for Appellee.

PAPERS SHOWING JUDICIAL PROCEEDINGS AS TO BOUNDARIES OF BOSQUE DE LOS PINOS.

The citizen, Antonio Ximenes, constitutional justice (alcalde) of the jurisdiction of Tome, and of the districts thereunto annexed.

I certify in the most sufficient manner, that whereas, the Francisco Xavier Chavez, resident of this jurisdiction of Isleta, presented himself before this court, verbally,, against the residents of Valencia in this jurisdiction, on account of damages he was sustaining in the destruction of a grove, called Los Pinos, and which is now his property, I proceeded to the aforesaid ground for the purpose of ascertaining the boundary, of what belongs to each one, and having caused the defendants to appear, they empowered the citizen, Felipe Vigil, of the same vicinity, with all the authority and right they had in the property in question, and the parties, plaintiff and defendant being present, and having argued all the right and reasons which they had in their favor, the said Vigil went and conducted me to the edge of a border called the old river (rio viejo), and distant from it towards the south, about ten yards,, and near some little houses which are being built in the place called Las Peraltas, as towards the east, where he showed me some large stones, which appeared to have been fastened in with sufficient purpose and formed a land mark, which sign he said was the boundary that made the division towards the north and separated the lands of his clients, with which the said Chavez expressed himself satisfied, and having directed them to keep within their boundaries to avoid another claim and not to injure their neighbor in anything, within what was there acknowledged as his property, to which they agreed, I executed the present document at the request of the interested party, on this common paper, there being none of the qualified, in

this jurisdiction, being obliged to attach the proper, I signed it with my attending witnesses acting by appointment in the absence of an notary, to which I certify in this place of Tome on the fifteenth day of the month of February, one thousand eight hundred and twenty four. I certify:

(Signed) ANTONIO XIMENES,
(Rubric.)

Attending: (Signed)
FRANCISCO IGNACIO DE MADONIA,
(Rubric.)

Attending: (Signed)
JOSE SALAZAR.

SURVEYOR GENERAL'S OFFICE,
Translators Department,
Santa Fe, N. M., June 7, 1855.

I certify the foregoing to be a translation of document marked F in claim No. 3, to the Bosque de los Pinos. DAVID V. WHITING,
Translator.

Sir Political Chief (Gefe Politico.)

Mariano Chavez y Castillo, resident of Los Padillas in the jurisdiction of Isleta, respectfully represents to you: That to the estate of Madam my mother, which I manage, belongs a grove, known by the name of Grove of the Pinos (Bosque de los Pinos), and which previously belonged to Don Clemente Gutierrez, deceased, from whose heirs my deceased father purchased from time to time, until he became possessor of the whole, as appears from the deeds of sale which they granted from time to time, and which are in my hands; but being impossible to procure the old deed which gave the possession to the said Gutierrez, deceased, a question of doubt has been raised by the residents of the jurisdiction of Valencia, as to the

limits or boundaries of said grove, notwithstanding its long and pacific possession by its legitimate possessors, and I have sustained injuries of various descriptions from the said residents, whom I have sued before the justice (alcalde), of Valencia, who, united with the corporation and residents, say they have an interest in my property, for which cause, and neither the justice (alcalde) or any other individual of the corporation being competent to take cognizance of the matter the formalities of the law preventing the justice (alcalde) and corporation of Valencia, from sitting in judgment on the case, I pray your honor to be pleased to direct the nearest justice (alcalde) or whoever you may deem proper, to hear my suit and execute to the party that may have justice, a document that will secure the property, and avoid suits and inconveniences in the future, which are always injurious to the contending parties.

I pray you to receive this on the paper on which it is written, there being none of the proper seal in this territory.

San Andres de los Padillas, October 14th, 1835.

(Signed) MARIANO CHAVEZ,

(Rubric.)

Santa Fe, October 16th, 1835.

If as the petitioner states, the constitutional justice of Valencia is legally disqualified from taking cognizance of the matter set forth in the petition, and if, as he also alleges, the magistrate of the corporation, and the whole vicinity are also disqualified, so that he cannot recur to the justice of the previous year, the constitutional justice of Tome, who is the nearest, will take cognizance of the matter in question, according to the practice adopted in the doctrine of the law, by Sala, and as the sovereign decree of the 18th of May, 1821, in its 11th article provides, in cases of this description, restricting himself to

what is indubitably observed in the regular order concerning these matters, endeavoring to avoid anything that may cause invalidity or obstruction in the proper administration of justice.

(Signed) PEREA,
(Rubric)

SURVEYOR GENERAL'S OFFICE,
Translators Department,
Santa Fe, N. M., June 7th, 1855.

I certify the foregoing to be a translation of document marked G in claim No. 3, to the Bosque de los Pinos.

DAVID V. WHITING,
Translator.

The citizen, Miguel Olona, constitutional justice (alcalde) and judge of the primary court of the district of Tome, etc.

I certify, according to law, that in a book existing in this archive under my charge, and in which are recorded the acts of compromise, is found one of the following tenor:

"In the town of Tome, on the twenty-seventh day of the month of October, one thousand eight hundred and thirty-five, by virtue of having presented himself before me, Don Miguel de Olona, constitutional justice (alcalde) of the jurisdiction of Tome, Don Santiago Abreu, resident of the city of Santa Fe, showing me a decree of the Honorable Political Chief (Gefe Politico) issued on the 16th instant, in which I am notified to take cognizanee, according to law, of a suit instituted by Don Mariano Chavez y Castillo, for damages caused by the residents of the jurisdiction of Valencia to his property, known as the Grove of the Pinos, said Mr. Chavez y Castillo having objected to the constitutional justice (alcalde) of the corporation and all the residents of Valencia, sitting in judgment in said case, being parties interested, and

Mr. Abreu having shown me a full power of attorney given to him by Mr. Chavez, to prosecute the matter to its final termination, I notified the justice (alcalde) of Valencia, forwarding him a copy of the aforementioned decree of the Honorable Political Chief (Gefe Politico) and asking him to appoint counsel for said residents to appear before my court on the following day, which accordingly took place, Don Juan Sanchez appearing as the counsel for the residents of Valencia. Whereupon I directed that both counsel should appear with their good men, for the purpose of settling the compromise, which was accordingly done, Abreu bringing Don Pablo Salazar as his good man, and Sanchez bringing the curate Don Francisco Ignatio de Mondariaga; and the case of compromise being opened, each counsel presented his power of attorney, and the following day was fixed for the purpose of examining the boundaries of the property in question, after this act I demanded from the counsel the documents in their favor, and Abreu answered, that as his principal had purchased the Grove of the Pinos from the heirs of the Pajarito estate, these only executed conveyances in which they state that they convey the portion they hold in the Grove, without setting forth boundaries, and that it has been impossible to find the deed giving possession to the Pajarito estate, notwithstanding all the efforts which have been made to procure it, the documents of the opposite parties, the place where the land marks were, the ancient possession, the knowledge of the ground and other facts of the same tenor, will show the justice which is demanded. Sanchez presented two documents, one made in the year one thousand seven hundred and fifty by certain Padillas to the natives of the Pueblo of Isleta, conveying to them a piece of land, the northern and southern boundaries of which are only set forth, without men-

tion being made of the eastern and western, and other made in the year one thousand seven hundred and ninety-five by the said natives of Pueblo of Isleta to the residents of Valencia, in which it appears that the former sell to the latter two thousand four hundred and twenty five and one-half varas of land, measured from south to north, of the same land sold to them by the Padillas, according to the aforementioned deed, giving them for their northern and southern boundaries the land marks that still exist, on the east the mountain, and on the west the river, these steps being taken and having heard the arguments of the parties, and considered well the matter, I asked the opinion apart of the good men, who both stated that as the northern land mark indicated, and as stated in the deed, made in the year one thousand seven hundred and fifty, it was clear that the Grove of the Pinos, from the ancient border, adjoining Las Peraltas, of the old river (rio viejo) upwards, was considered by the natives of Isleta as property of others, as no mention was made of said Grove nor did they ever consider it as their own, and that according to the deed of one thousand seven hundred and ninety-seven, the aforesaid natives sold, towards the east, more than what belonged to them, or as according to the same deed they give the river as the boundary, without its having been given to them by the old deed, and without mentioning the Grove of the Pinos, which they have always considered as the property of others, they trespassed in selling a portion of it according to the number of varas they sold; that considering all of these reasons they are of opinion that the present judge, deliver to the counsel Don Santiago Abreu, as property of Don Mariano Chavez, from the border of the old river (rio viejo) adjoining Las Peraltas, upwards, and that the counsel, Don Juan Sanchez, retain the right of claiming

from the natives of the Pueblo of Isleta the land which is known to be curtailed from that which they purchased without any title, and I, the aforesaid judge, adhering to the opinion of the good men, sentenced that from the border, adjoining Las Peraltas, of the old river (rio viejo) upwards, be delivered by me to Don Santiago Abreu, as the property of Don Mariano Chavez y Castillo, Don Juan Sanchez retaining the right of claiming from the natives of the Pueblo of Isleta the land wanting according to this deed; and the foregoing proceedings being read to the counsel, Abreu said that he was satisfied with the sentence, and Sanchez that he was not satisfied, that he would, however, make use of the right he had to claim from the natives of Isleta, the land of which he is curtailed, and both signed with me the aforesaid judge and those in my attendance with whom I act by appointment in the absence of a notary, to which I certify. Miguel de Olona; associate, Pablo Salazar; associate, Francisco Ignacio de Mondariaga; Santiago Abreu, counsel; Juan Sanchez y Castillo, counsel; attending, Jose Maria Labadi; attending, Gregorio Baca.

Which copy is truly and legally made from the original, to which I refer, and for the proper use, I have executed it at the request of Don Santiago Abreu, in the presence of two witnesses this 28th day of October, 1835.

(Signed) MIGUEL DE OLONA,
(Rubric.)

Attending: (Signed)
GREGORIO BACA,
(Rubric.)

Attending: (Signed)
JOSE MARIA LABADI,
(Rubric.)

SURVEYOR GENERAL'S OFFICE,
Translators Department,
Santa Fe, N. M., July 14th, 1855.

I certify the foregoing to be a translation of document H, in claim No. 3, to the Bosque de los Pinos.

DAVID V. WHITING,
Translator.

IN THE COURT OF PRIVATE LAND CLAIMS:

ALEJANDRO SANDOVAL, *et al*,
vs.
UNITED STATES.

Mr. Justice Sluss delivered the unanimous opinion of the court:

There is but one question involved in this case, upon which we wish to express an opinion at this time, and that is, whether at the time of the acquisition of this territory by the United States the grant under which the plaintiffs claim title was a complete and perfect title within the meaning of the act of congress creating this court, so as to authorize a confirmation for more than eleven square leagues of land.

Under the law of Spain it appears to have been required that all grants of land issued by the governors of territories should be approved and confirmed by some designated official or authority before becoming finally valid, so as to pass the legal title from the crown.

The question is raised in this case, whether such confirmation was had of this grant, so as to make it a complete and perfect title.

In order to determine this question it is necessary to examine the laws and regulations of Spain upon the subject. This grant was issued in 1710; the grant was made by the governor, the grantee, Vigil, placed in possession and thereafter he conveyed the land described in the grant to Gonzales, under whom the present occupants and claimants derive title.

On October 15, 1754, a royal regulation was issued by the crown, for the purpose of having the outstanding titles to lands investigated. Officers and tribun-

als were therein designated for the purpose of having these titles which had been legally issued confirmed, and as to those which had not been legally issued, of having the lands restored to the crown.

A very full system of investigation was provided for by the regulation. By the second section it was provided that the judges and officers to whom jurisdiction for the sale and composition of the royal lands may be sub-delegated, should "proceed with mildness, gentleness and moderation, with verbal and not judicial proceedings, in case of those lands which the Indians shall have possessed, but in regard to those granted to towns no charges shall be made, the towns shall be maintained in possession of them and those that may have been seized shall be restored to them, and their extent enlarged, nor shall severe strictness be used toward those already in possession of Spaniards, or persons of other nations, and in regard to all, the requirements of laws 14, 15, 17, 18 and 19, title 12, book 4 of the recopilacion de Indias, shall be observed."

In our opinion this is an express declaration making the provisions of law 14 a part of this royal regulation, to the same extent as if it had been incorporated in it. This law 14 is found on page 52 of 2 White. It appears to be a portion of a prior regulation issued for the same purpose and under the same circumstances as that of October 15, 1754, and makes provisions for the investigation of outstanding titles to lands similar to those provided in that of 1754. It provided for the investigation of these titles by audiencias and other authorities, and also provided the manner of such investigation, and among others contained this provision: "For all this we order and command the viceroys, presidents and pretorial audiencias, whenever they shall think fit, to appoint a sufficient time for the owners of lands to exhibit be-

fore them and the ministers of their audience, whom they shall appoint for that purpose, the titles to lands, estates, huts, and caballerias, who, after confirming the possession of such as hold the same by virtue of a good and legal title, or by a just prescription, shall restore to us the remainder, to be disposed of according to our pleasure."

In our view this regulation of 1754, in connection with law 14 referred to, is an express recognition of the rule, that title to lands in the Indias could be obtained, good as against the crown, by what was termed a just prescription.

Further referring to the regulation of 1754, section 3 required that notice should be given to all persons holding lands under titles originating subsequent to the year 1700 and up to the time of the issuing of the regulation, requiring them to exhibit their titles and show by what right they held their lands, and provided that this notice should warn them that they would be deprived of their lands, if, without just cause, they failed to exhibit their warrants within the time limited. Section 4 provided, that those who held lands by titles issued prior to 1700, should be in no way molested, and that their titles should be confirmed without investigation. Section 5 provided that these persons holding lands by titles issued subsequent to 1700, which had not been confirmed by the tribunals or officers designated for that purpose, should exhibit them, and that the tribunals mentioned should investigate them and the bona fides of their issuance, and the quantity and value of the land, and determine whether or not the titles so issued should be confirmed. Sections 7 and 8 provided that the notice mentioned should also have incorporated the fact that rewards would be given to those who should inform of lands occupied without legal title, and that a portion of lands so occupied, would

be adjudged to those who should inform against them, and that the lands so held would be restored to the crown for the purpose of being re-granted.

We think that, from a review of these provisions of the regulation of 1754, taken as a whole, it was recognized by the crown at that time that the legal title to land could be taken from the crown by what was called a just prescription. This renders it necessary to inquire what was meant by a just prescription.

The rules upon this subject are fully laid down in the civil law of Spain, which we find in 1st White, beginning at page 91; it says "Prescription is to hold the property or thing of another for a certain length of time and to make it thereby one's own, so that the rightful owner afterwards can not deprive you of it. * * * To constitute prescription, good faith, just title and capacity of the thing for the purpose and the persons who prescribe, are necessary, as also continued and uninterrupted possession for a determinate time. * * * Good faith consists in the possessor believing that the person from whom he received the thing had the right to alien or transfer it. * * * Just title consists in the cause or consideration by which possession of the thing is obtained being one of those by reason of which dominion is acquired, as purchase, gift, inheritance, etc."

We find also further provisions as to the time in which things were prescribed as against the crown. "The time in which things are prescribed is comprehended under two kinds of prescription, immemorial and temporal. The last is proved by witnesses of good fame and character, who depose to having seen the person in possession of the thing or property for forty years, and the first having heard their ancestors say that they never saw nor heard anything to the contrary." By royal decree dated July 16, 1819, *2nd White 562*, we find title by prescrip-

tion to be described as possession of forty years. This decree was issued with reference to the existing condition of things concerng the crown lands in the Island of Cuba, and contains the following: "In the absence of other title a just prescription, that is, a possession of forty years, duly approved according to law, shall be admitted and respected."

We further find in law 4, title 8, book 11, Recopilacion de Indias, a provision that: "Possession immemorial when it is proved, how and when, and with the circumstances required by the law of Toledo, a possession of forty years is sufficient to prescribe against us and our successors as regards cities, towns and places, etc."

From this investigation, we can not escape the conclusion that a continued, uninterrupted possession of land for a period of forty years, the possession of which has been obtained under an apparent title, that is, such a title as would give to the occupant the right of possession and which possession had been taken in good faith and in belief on the part of the occupant, that he was entitled to have his title confirmed to him, would be sufficient to transfer the entire title from the crown of Spain to the person who held such possession.

This brings us to the application of these principles to the facts of this case. The evidence is sufficient to show that possession of the tract in controversy was taken by Vigil in 1710, under a grant regularly issued by the governor, and which was amply sufficient to confer the right of possession of the property upon Vigil and his successors; that possession was taken in good faith; that it was held continuously from 1710 up to the time of the issuing this decree in 1754. This of itself would create a title by prescription as against the crown of Spain, and entitle the holders of the possession under the

original grant to a confirmation of their title by the officials designated in the decree of 1754 as a matter of legal right, even if by the terms of that decree, they were required to present evidence of such prescriptive right in order to obtain such confirmation.

We think, therefore, it necessarily follows that they had a perfect title at the date of the decree of 1754.

But suppose we should conclude that it was necessary under the decree of 1754 for the holders of this tract to go before the governor and make proof of their original grant, and of their continued possession, in order to obtain a confirmation as provided for in the decree, and that such confirmation was prerequisite to their obtaining a full legal title, whether the evidence before us is sufficient to justify the finding that such was done.

Immediately following the issuance of this decree of 1754, another period of forty years continuous possession of this tract is shown to have been held under the title issued to Vigil, that this possession was characterized by the same good faith that characterized the original taking possession, so that even after the decree of 1754, under the provisions of Spanish law another title by prescription was created in the occupants of this tract.

Therefore, if we are to hold that it was necessary under the decree of 1754, for the holders of the title to present it for approval and obtain a confirmation, considering the subsequent continuous possession from that time until Spain relinquished dominion over the territory, and considering the general condition of things in the country at that time, and considering these provisions of sections 7 and 8 of the regulations of 1754, offering rewards and portions of the lands to those who should inform against the land as being held without confirmation of title; these

matters, as circumstantial evidence, render the conclusion irresistible that such approval must have been given and such confirmation made.

We think a title by prescription proceeds upon a presumption and operates as a conclusive presumption of the existence of every fact necessary to transfer the legal title and right of possession from the original rightful owner to the party holding under such prescription.

That being the case, there remains nothing to be done concerning this grant to render the title of the complainants complete. The legal title had passed from the crown to the parties holding possession long prior to the cession of this territory to the United States. That being the case, it necessarily follows that the claimants held a perfect title within the meaning of our act of congress, at the time of the acquisition of this territory by the United States government. Judgment, therefore, will be for the plaintiffs, and a confirmation for the full amount of land claimed.